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Attorneys for Defendants Kraft Foods Global, Inc.,
 improperly sued as Kraft Foods North America, and Kraft Foods Inc.

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

EVANGELINE RED and RACHEL
 WHITT, on Behalf of Themselves and
 All Others Similarly Situated,

Plaintiffs,
 vs.

KRAFT FOODS INC., KRAFT
 FOODS NORTH AMERICA, and
 KRAFT FOODS GLOBAL, INC.,

Defendants.

No. CV10-01028-GW (AGRX)

**KRAFT FOODS' STATUS
 REPORT REGARDING THE
 MOOT NATURE OF
 PLAINTIFFS' CLAIMS**

Hearing Date: June 4, 2012
 Time: 8:30 a.m.
 Courtroom: 10
 Judge: Hon. George H. Wu
 Action Filed: February 11, 2010

1 In opposing Plaintiffs' Rule 23(b)(2) class certification motion, Kraft Foods
2 previously offered the declaration of Ellen Smith, the chief counsel of the snacks
3 division who, among other things, reviews the labels of the products at issue. She
4 stated that Kraft Foods had stopped using all of the challenged statements at issue
5 (except for "Made with Real Vegetables") on the disputed snacks. Indeed, she stated
6 that Kraft Foods had stopped using many of them years *before* this lawsuit was filed,
7 and that it had "no plans" to use them again in the future. *See* Dkt. 221-1 (Declaration
8 of Ellen Smith).

9 This Court issued a tentative opinion stating that Plaintiff's Rule 23(b)(2)
10 certification motion was not necessarily moot because a lawyer (as opposed to a
11 "marketing decision-maker") "merely state[d] that to the best of her knowledge the
12 company currently 'has no plans' to use the label." Dkt. No. 232 (Tentative Op. at 6).
13 The Court, however, at the hearing invited Kraft Foods to submit a declaration from a
14 marketing decision-maker who could more definitively state that that Kraft Foods
15 would not use the challenged statements in the future.

16 Kraft Foods submits the declaration of a senior vice president that should
17 remove any lingering doubt that Plaintiffs' request for an injunctive-only class is
18 moot. As Kraft Foods' Senior Vice President – Biscuit, Jay A. Cooper has
19 "responsibility for all claims made as part of the packaging, advertising, and
20 marketing" of the products at issue. *See* Declaration of Jay A. Cooper at ¶ 1 (attached
21 as Exhibit A). In short, he is the business and marketing "decision-maker" for any
22 statements that may be made on the packaging of Kraft Foods snacks.

23 He has stated under the penalty of perjury that the following statements —
24 "Sensible Snacking," "Sensible Solution," "Smart Choices," and "A good source of
25 Calcium Iron Zinc to help Support Kids' Growth and Development" — are no longer
26 being used on the packaging of the products at issue, and that "Kraft Foods has no
27 intention of using and *will not be using*" these statements in the "*packaging*,
28

1 advertising, or marketing material at any time in the future.” Cooper Decl. at ¶¶ 4-7
 2 (emphasis added).

3 In light of Mr. Cooper’s sworn declaration, Plaintiffs’ request to certify an
 4 injunctive relief-only class is moot. There is nothing left for this Court to do with
 5 respect to the allegedly misleading statements because Kraft Foods has ceased using
 6 them on the challenged products, and its Senior Vice President has stated under oath
 7 that it will not use them “at any time in the future.” Plaintiffs simply cannot show that
 8 they face a “cognizable danger of recurrent violation, something more than the mere
 9 possibility which serves to keep the case alive.” Tentative Op. at 6 (*citing Am. Fed’n*
 10 *of Gov’t Employees, AFL-CIO v. Brown*, 866 F. Supp. 16, 20 (D.D.C. 1994)).

11 On June 19, Kraft Foods’ counsel met-and-conferred with Plaintiffs’ counsel,
 12 and provided the details of this declaration. Plaintiffs’ counsel, however, insisted that
 13 the declaration would not moot this litigation because they claim that Kraft Foods
 14 should not be able to use any “health and wellness” claims if its products still contain
 15 trace amounts of trans fat (partially hydrogenated vegetable oil). Kraft Foods’ counsel
 16 responded that Plaintiffs’ definition of a “health and wellness” claim is far too vague
 17 and is a moving target that appears to expand or change by the briefing. In any event,
 18 Plaintiffs can initiate a new lawsuit if Kraft Foods supposedly uses a new “health and
 19 wellness” claim that is not the subject of this lawsuit.

20 Therefore, the only remaining statement at issue now is “Made with Real
 21 Vegetables.”¹ As noted in Kraft Foods’ brief in opposition to the Rule 23(b)(2) class

22
 23 ¹ As this Court noted in its tentative opinion, Plaintiffs’ third motion for class
 24 certification defined ten subclasses in detail but challenged only four statements, three
 25 of which are now rendered moot in light of Kraft Foods’ declaration (*see* Tentative
 Op. at 2-3 (*citing* Plaintiffs’ class certification motion)):

26 “Plaintiffs now propose ten different subclasses:

- 27 (1) The Ginger Snaps Subclass: All persons who purchased in the Class States,
 28 between April 1, 2008 and December 31, 2010, Ginger Snaps in packaging
 bearing the phrase “sensible solution.”

(Continued...)

certification motion (Dkt. No. 221), several new decisions from district courts in the Ninth Circuit — which were issued after the parties had briefed the motion to dismiss in 2010 — underscore that “Made with Real Vegetables” is not actionable. *See Henderson v. Gruma Corp.*, No. 10-04173, 2011 WL 1362188, at *11-13 (C.D. Cal.

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- (2) The Vegetable Thins Subclass: All persons who purchased in the Class States, on or after January 1, 2007, Vegetable Thins in packaging bearing the phrase “made with real vegetables.”
 - (3) The Premium Saltines Subclass: All persons who purchased in the Class States, between February 11, 2006 and June 30, 2011, Premium Saltines in packaging bearing the phrases “sensible snacking,” or “sensible solution.”
 - (4) The Teddy Grahams I Subclass: All persons who purchased in the Class States, between April 1, 2006 and June 1, 2009, 10-ounce or 9.5 ounce varieties of Teddy Grahams in packaging bearing the phrases “sensible snacking” or “sensible solution.”
 - (5) The Teddy Grahams II Subclass: All persons who in the Class States, between January 1, 2009 and December 31, 2011, 10-ounce or 9.5-ounce varieties of Teddy Grahams in packaging bearing the phrase “help support kids’ growth and development.”
 - (6) The Honey Maid Grahams Subclass: All persons who purchased in the Class States, between February 11, 2006 and April 1, 2010, Honey Maid Grahams in packaging bearing the phrases “sensible snacking,” or “sensible solution.”
 - (7) The Ritz Whole Wheat Subclass: All persons who purchased in the Class States, between January 1, 2007 and June 30, 2010, the Whole Wheat variety of Ritz Crackers in packaging bear the phrase “sensible solution.”
 - (8) The Ritz Reduced Fat Subclass: All persons who purchased in the Class States between February 11, 2006 and June 30, 2010, the Reduced Fat variety of Ritz Crackers in Packaging bearing the phrases “sensible snacking” or “sensible solution.”
 - (9) The Ritz Low Salt Subclass: All persons who purchased in the Class States, between January 1, 2007 and June 30, 2010, Low Sodium or Hint of Salt varieties of Ritz Crackers in packaging bearing the phrase “sensible solution.”
 - (10) The Ritz Roasted Vegetable Subclass: All persons who purchased in the Class States, on or after February 11, 2006, the Roasted Vegetable variety of Ritz Crackers in packaging bearing the phrase “made with real vegetables.” Tentative Op. at 3 (quoting Plaintiffs’ class certification motion).”

1 Apr. 11, 2011) (the statement “With Garden Vegetables” is not likely to deceive a
2 reasonable consumer as a matter of law because it includes “avocado powder,
3 dehydrated onion, garlic powder, and bell pepper.” *See also Rooney v. Cumberland*
4 *Packing Corp*, No. 12-33, 2012 WL 1512106 (S.D. Cal. April 16, 2012) (dismissing
5 false advertising claim as a matter of law because a reasonable consumer would know
6 that “Sugar in the Raw” is not unprocessed and unrefined sugar in light of “common
7 industry marketing”).

8 Accordingly, this Court should deny Plaintiffs’ motion to certify a Rule
9 23(b)(2) injunctive relief-only class, and address the remaining statement at issue in
10 this case.

11
12 Dated: June 26, 2012

JENNER & BLOCK LLP

13 /s/ Kenneth K. Lee

14 By: Kenneth K. Lee

15 Attorneys for Defendants
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Exhibit A

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KRAFT FOODS INC., KRAFT
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 KRAFT FOODS GLOBAL, INC.,

Defendants.

No. CV10-01028 (GW) (AGRX)

**DECLARATION OF JAY COOPER
 IN SUPPORT OF KRAFT FOODS
 GROUP, INC.'S OPPOSITION TO
 PLAINTIFFS' SECOND RENEWED
 MOTION FOR CLASS
 CERTIFICATION**

Hearing Date: July 2, 2012
 Time: 8:30 a.m.
 Courtroom: 10
 Judge: Hon. George H. Wu
 Action Filed: February 11, 2010

1 I, Jay A. Cooper, declare:

2 1. I am Senior Vice President – Biscuit of Kraft Foods Group, Inc. (formerly
3 known as Kraft Foods Global, Inc.) (hereinafter “Kraft Foods”). I have held the
4 position of Senior Vice President – Biscuit at the Kraft Foods Snacks & Confectionery
5 Business Unit, located in East Hanover, New Jersey, since 2008. As Senior Vice
6 President – Biscuit, I am responsible for a portfolio of products that includes the
7 products at issue in this suit: Teddy Grahams Graham Snacks (including Cinnamon,
8 Honey, and Chocolatey Chip varieties), Vegetable Thins Baked Snack Crackers, Ritz
9 Crackers (including Roasted Vegetable variety, Hint of Salt variety, Reduced Fat
10 variety, and Whole Wheat flavor), Original Premium Saltine Crackers, Honey Maid
11 Grahams (including Honey and Low Fat Honey varieties), and Old Fashioned Ginger
12 Snaps (collectively “the Products”). As Senior Vice President – Biscuit, I have
13 knowledge of and responsibility for all claims made as part of the packaging,
14 advertising, and marketing of the Products. I am aware of Kraft Foods’ plans and
15 intentions for future packaging, advertising, and marketing of the Products. The facts
16 detailed below are within my personal knowledge. If called as a witness, I could and
17 would testify competently to those facts.

18 2. Kraft Foods Global, Inc. changed its name to Kraft Foods Group, Inc. on
19 March 16, 2012, when it became a Virginia corporation.

20 3. The phrases “Sensible Snacking,” “Sensible Solution,” “Smart Choices
21 Program,” and “A good source of Calcium Iron Zinc to Help Support Kids’ Growth
22 and Development” have been used on certain of the Products’ packaging, advertising,
23 and marketing materials in the past. The phrase “Sensible Snacking” appeared on the
24 front of certain packages as part of a yellow and blue box, also referred to as a “flag”
25 or “callout,” that included that phrase over a short list of product attributes (“Sensible
26 Snacking”). The phrase “Sensible Solution” appeared on the front of certain packages

1 as part of a light green and dark green box, also referred to as a “flag” or “callout,” that
 2 included that phrase over a short list of product attributes (“Sensible Solution”). The
 3 phrase “Smart Choices Program” appeared on the front of certain packages as part of a
 4 green and white box, also referred to as a “flag” or “callout,” that included that phrase
 5 over the number of calories per serving and the number of servings per package
 6 (“Smart Choices”). The phrase “A good source of Calcium Iron Zinc to Help Support
 7 Kids’ Growth and Development” appeared in a checklist-style flag (“Help Support
 8 Kids’ Growth and Development”) on the packaging of certain Teddy Grahams Graham
 9 Snacks products.

10 4. Sensible Snacking is no longer used on the packaging of the products
 11 included in the Original Premium Saltines Subclass definition (“Original Premium
 12 Saltines”), the products in the Teddy Grahams I Subclass definition (“Teddy Grahams
 13 I”), the products in the Honey Maid Grahams Subclass definition (“Honey Maid
 14 Grahams”), or Ritz Crackers Reduced Fat flavor. Kraft Foods has no intention of
 15 using and will not be using Sensible Snacking on Original Premium Saltines, Teddy
 16 Grahams I, Honey Maid Grahams, or Ritz Crackers Reduced Fat flavor packaging,
 17 advertising, or marketing material at any time in the future.

18 5. Sensible Solution is no longer used on the packaging of the product
 19 included in the Old Fashioned Ginger Snaps Subclass definition (“Ginger Snaps”),
 20 Teddy Grahams I, Honey Maid Grahams, Ritz Crackers Whole Wheat flavor, Ritz
 21 Crackers Reduced Fat flavor, or Ritz Crackers Hint of Salt flavor. To the best of my
 22 knowledge, Sensible Solution was not used on the Original Premium Saltines
 23 packaging. Sensible Solution is not currently used on Original Premium Saltines
 24 packaging. Kraft Foods has no intention of using and will not be using Sensible
 25 Solution on Ginger Snaps, Teddy Grahams I, Honey Maid Grahams, Ritz Crackers
 26 Whole Wheat flavor, Ritz Crackers Reduced Fat flavor, Ritz Crackers Hint of Salt

1 flavor, or Original Premium Saltines packaging, advertising, or marketing material at
2 any time in the future.

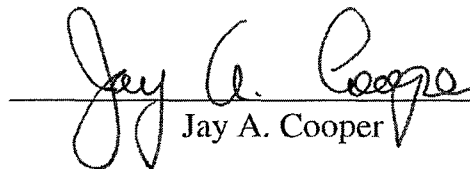
3 6. Help Support Kids' Growth and Development is no longer used on the
4 packaging of products in the Teddy Grahams II Subclass ("Teddy Grahams II"). Kraft
5 Foods has no intention of using and will not be using Help Support Kids' Growth and
6 Development on Teddy Grahams II packaging, advertising, or marketing material at
7 any time in the future.

8 7. Smart Choices is no longer used on the packaging of Teddy Grahams I or
9 Teddy Grahams II. Kraft Foods has no intention of using and will not be using Smart
10 Choices on Teddy Grahams I or Teddy Grahams II packaging, advertising, or
11 marketing material at any time in the future.

12
13 FURTHER AFFIANT SAITH NOT.

14 I AFFIRM, UNDER THE PENALTIES FOR PERJURY, THAT THE
15 FOREGOING REPRESENTATIONS ARE TRUE TO THE BEST OF MY
16 INFORMATION, KNOWLEDGE AND BELIEF.

17
18 Dated: June 19, 2012

19 
Jay A. Cooper